UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNCIANS – COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

and **Case 03–CB–256179**

STEPHENS MEDIA GROUP–MASSENA, LLC

Alicia E. Pender, Esq.,
for the General Counsel.
Judiann Chartier, Esq. (NABET-CWA),
of Washington, DC for the Respondent.
Michael King, Esq. (Winters & King, Inc.),
of Tulsa, OK for the Charging Party.

DECISION

ELIZABETH M. TAFE, Administrative Law Judge. This case concerns an allegation that National Association of Broadcast Employees & Technicians—Communications Workers of America, AFL-CIO (Respondent, Union, or Respondent-Union) failed and refused to bargain in good faith with Stephens Media Group—Massena, LLC (SMG-Messina or Charging Party) in violation of Section 8(b)(3) and 8(b)(1)(A) of the National Labor Relations Act (the Act).[1] This case follows the issuance of an administrative law judge's decision (ALJD) based on charges filed by the Union alleging unfair labor practices by SMG-Massena and its sister entity Stephens Media Group--Watertown (SMG-Watertown) in which the two related entities, SMG-Massena and SMG-Watertown (the companies) were found to have violated the Act in various ways, including violations of Section 8(a)(3) and (5) of the Act.[2]

Shortly after the issuance of the ALJD in the prior case, SMG-Massena requested bargaining with the Respondent-Union for a successor contract, while at the same time it pursued exceptions to the ALJD before the Board and continued to fail to remedy the violations found, presumably pending the Board's review. The parties do not dispute that SMG-Massena

[1] 29 U.S.C. §§ 158(a)(1), et seq.

[2] See *Stephens Media Group—Watertown, LLC and Stephens Media Group—Massena, LLC and National Association of Broadcast Employees and Technicians—Communications Workers of America, AFL-CIO*, Cases 03-CA-226225, 03-CA-227924, 03-CA-227946, Charles J. Muhl, Administrative Law Judge, JD-04-20 (January 24, 2020).

requested bargaining by letter on January 31, 2020.[3] However, the Respondent-Union asserts that it was not obligated to bargain with SMG-Massena until the multiple violations found were remedied and the status quo restored. The General Counsel asserts, however, that the Respondent-Union was not privileged to fail or refuse to bargain in good faith with SMG-Massena regarding the Massena Unit in the absence a full, remedial restoration of the status quo under the circumstances, due to the Union's articulation that unilateral changes must be remedied. Unilateral change violations were found against only SMG-Watertown, affecting only the separate Watertown unit.

The Respondent also raises several affirmative defenses, including the threshold affirmative defense that the 8(b)(3) allegation before me is time-barred, because, according to the Respondent, outside of the 6-month statute of limitations of Section 10(b) of the Act, the Respondent unequivocally notified SMG-Massena of its insistence that the companies rescind the unilateral changes before it would return to the bargaining table. The Respondent further argues that the complaint should be dismissed because the complaint attempts to relitigate the same facts already considered in a prior case under a new legal theory. See *Jefferson Chemical, Co*. 200 NLRB 992 (1972). As discussed in more detail below, I find that these affirmative defenses have merit, and I shall dismiss the complaint.[4]

Statement of the Case

This case is before me on a stipulated record.[5] The charge in Case 03-CB-256179 was filed by SMG-Massena on February 11, 2020,[6] and a copy was served on Respondent by U.S. mail on the same date. The Regional Director for Region 3 issued a Complaint and Notice of Hearing, which was served on the Respondent via certified mail, on March 18. Copies were served on the other representatives and parties by first class mail. The Respondent timely filed its Answer on April 1. The complaint alleges that since about February 4, the Respondent, as the exclusive collective-bargaining representative of a unit of announcer-operators and technician-announcers employed by SMG-Massena, has failed and refused to bargain with SMG-Massena concerning terms and conditions of employment, in violation of Section 8(b)(3).

On July 20, the parties submitted a Joint Motion and Stipulation of Facts, requesting that I decide the foregoing allegations based on a stipulated record. The parties waived their rights to a hearing, and, therefore, to examine and cross-examine witnesses. I granted the motion and, on August 21, the parties submitted their respective posthearing briefs.

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[3] Dates are in 2020 unless otherwise indicated.

[4] The Respondent also asserts that the complaint should be dismissed because the Charging Party failed to comply with the notice requirements of Sec. 8(d). However, this defense is raised on a stipulated record that does not contain sufficient evidence to support the assertions. I find this defense lacks merit on this record.

[5] I received the parties' Joint Motion and Stipulation of Facts with its attachments as "Joint Exhibit 1." The motion lists stipulated facts identified as (a) to (bb) and attaches exhibits identified as A to J. I refer to the listed, stipulated facts as "Jt. Fact __" and to the motion's attachments as "Jt. Exh. __". If referring to the motion itself, I refer to "Jt. Mot. at (page number)."

[6] Although the docketed date on charge is February 12, the parties stipulated that the charge was filed and served of February 11.

On the entire record and after fully considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following findings of fact, conclusions of law, and recommended disposition.

FINDINGS OF FACT

I. JURISDICTION

At all times material to this case, SMG-Massena has been a limited liability company with an office and place of business in Massena, New York (the Charging Party's facility) where it operates radio stations that advertise goods sold nationally. Annually, the Charging Party derives gross revenues in excess of $100,000. Annually, the Charging Party, in conducting its operations described above, purchases and receives at its Massena, New York facility goods and materials valued in excess of $5,000 directly from points outside the State of New York.

The parties stipulate, and I find, that at all times material to this case, SMG-Massena has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulate, and I find, that at all times material to this case, the Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the above, I find that this dispute affects commerce and the Board has jurisdiction pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issue Presented

The issue presented as stipulated by the parties is whether Respondent, as the exclusive collective-bargaining representative of the Massena Unit, has failed and refused to bargain with the SMG-Massena concerning terms and conditions of employment of the Massena Unit, in violation of Section 8(b)(3) of the Act.

B. Stipulation of Facts

The parties agree that the following facts are true. In so doing, the parties state they have not conceded the relevance of each fact recited, and that their stipulation is made without prejudice to any objection that a party may have as to the relevance of the facts. The parties further stipulate that any party urging that particular facts are irrelevant will do so in its brief to the administrative law judge.

At all material times, the following individuals held the positions set forth opposite their respective names and have been agents of Respondent within the meaning of Section 2(13) of the Act:

Judiann Chartier - legal representative
Ronald Gabalski - staff representative

(Jt. Fact g.)

The following employees of the SMG-Massena (the Massena Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [A]ll Announcer-Operators and Technician-Announcers (Group I and II) (hereinafter called "Employees covered by this Agreement") now or hereafter employed by the Company, its lessees, successors or assigns during the time of this Agreement.

(Jt. Fact h.)

At all material times, SMG-Massena has recognized the Respondent as the exclusive collective-bargaining representative of the Massena Unit. This recognition has been embodied in successive CBAs, the most recent of which was effective from May 1, 2015 through May 1, 2018. (Jt. Fact i.) At all material times, based on Section 9(a) of the Act, the Respondent has been the exclusive collective-bargaining representative of the Massena Unit. (Jt. Fact j.)

On about July 10, 2019, SMG-Massena's legal representative Michael King e-mailed a letter to Respondent's staff representative Ronald Gabalski. (Exh. B; Jt. Fact k.) King's letter states in pertinent part:

> In an effort to resolve the current impasse, the Company is willing and ready to continue face to face bargaining with the Union. If you and your bargaining unit are interested in meeting face to face to continue the bargaining process, please provide me various dates in the upcoming months. I am not available the following weeks:
>
> 1. July 24-August 5, 2019
> 2. August 25-August 29, 2019 (NLRB hearing)
> 3. September 20-October 6, 2019
>
> If possible, I would like for us to meet before the trial.

On about July 16, 2019, Respondent's staff representative Ronald Gabalski e-mailed a letter to the SMG-Massena's legal representative Michael King. (Jt. Exh. C; Jt. Fact j.) Gabalski's letter states in pertinent part:

> In an effort to resolve the pending unfair labor practice matters against Stephens Media Group, NABET-CWA advised SMG's counsel that it would resume bargaining once the bargaining unit members laid off in 2018 were reinstated with back pay, and the unilateral changes were rescinded. That remains our position.

On about October 21, 2019, the SMG-Massena's legal representative Michael King e-mailed a letter to Respondent's staff representative Ron Gabalski. (Jt. Exh. D; Jt. Fact m.) King's letter states in pertinent part:

> I wanted to take this opportunity to once again, on behalf of the Company, propose some available dates to continue bargaining if in fact what you testified to at the hearing is true which is that the Union is desirous of reaching an agreement with the Company. [Dates proposed in November] Please advise as to your availability.

On about January 24, 2020, ALJ Charles J. Muhl issued his decision (the prior ALJD) in Cases 03-CA-226225, 03-CA-227924, and 03-CA-227946 (the prior case). (Jt. Exh. E; Jt. Fact n.) (See discussion below.)

On about January 31, 2020, the SMG-Massena's legal representative, Michael King e-mailed a letter to Respondent's staff representative Ronald Gabalski. (Jt. Exh. F; Jt. Fact o.) King states in his letter in pertinent part:

> In follow up to my letter of October 21, 2019, I am again requesting dates in February/March to resume collective bargaining between SMG and the Union regarding the Massena and Watertown Agreements. As I understand it, the Union now wants to negotiate the contracts separately. I am providing two day time frames to accomplish the same. [multiple dates provided in February and March].
>
> You have failed to respond to my recent requests to set bargaining dates but prior to my advising my client to avail themselves of their options through the NLRB to require the Union to bargain I wanted to reach out one more time to see if we could agree on some dates. If I have not heard from you by February 10, 2020, I will advise my clients as to its remedies under the Act.

On about February 4, 2020, Respondent's staff representative Ronald Gabalski e-mailed a letter to the SMG-Massena's legal representative, Michael King. (Jt. Exh. G; Jt. Fact p.) Gabalski states in his letter in pertinent part:

> NABET-CWA does wish to resume collective bargaining between the Union and Stephens Medial Group regarding the Massena and Watertown Agreements. However, NABET-CWA wants Stephens Medial Group to first rescind all of the unilateral changes made in 2018, prior to the next round of bargaining.

On about February 12, 2020, Respondent's legal representative Judiann Chartier e-mailed the SMG-Massena's legal representative in Cases 03-CA-226225, 03-CA-227924, and 03-CA-227946, Renee Williams. (Jt. Exh. H; Jt. Fact q.) Cartier's letter states in pertinent part:

> Kindly consider this letter as NABET-CWA's request that Stephens Media Group restore all terms and conditions of employment for unit employees which existed

> prior to the unilateral changes implemented on or after August 2, 2018, in Watertown, NY, and continue them in effect until the parties reach a new collective-bargaining agreement. This includes the reinstatement of [six employees listed] to the positions held prior to August 23, 2018, and the make whole remedy ordered by the Administrative Law Judge Charles Muhl in his January 24, 2020 decision in the unfair labor practice matter. As soon as the status quo has been restored, the parties can resume negotiations for a successor collective bargaining agreement.

SMG-Massena and the Respondent have not held a bargaining session to negotiate a successor collective-bargaining agreement for the Massena Unit since October 2018. (Jt. Fact r.) The Respondent, as the exclusive collective-bargaining representative of the Massena Unit [described above], has failed and refused to bargain with SMG-Massena concerning the terms and conditions of employment of the Unit (Jt. Fact s), pending the remedial restoration of the status quo ante as ordered in the prior ALJD.[7]

As noted above, the charge was filed in the present case, Case 03-CB-256179 on February 11, 2020, and served by U.S. mail on the Respondent the same day.

C. January 24, 2020 Administrative Law Judge's Decision

Judge Muhl's decision (the prior ALJD) speaks for itself. My references to and discussion of the facts and conclusions of law in the prior ALJD as they apply to the case before me are not meant to, and cannot, change the factual findings or conclusions of law in that case, which is pending before the Board on exceptions filed by SMG-Massena and SMG-Watertown.[8]

As noted above, the Massena Unit and the Watertown Unit at SMG have traditionally been separate bargaining units with separate, materially different CBAs.[9] The most recent CBAs in both units were in effect from May 1, 2015 to May 1, 2019. SMG and the Union began discussing bargaining for successor contracts in about April 2018 and met and began bargaining about a successor CBA in the Watertown Unit between April and August 2018, but they did not engage in bargaining about a successor CBA for the Massena Unit. The Respondent Union provided initial proposals to SMG-Massena for a CBA for the Massena Unit, but never received a response from them.

The Respondent Union filed unfair labor practice charges against SMG-Massena and SMG-Watertown in August 2018 alleging, among other charges, that the companies had been failing to bargain in good faith by insisting on jointly negotiating the two CBAs, which is a permissive subject of bargaining. A consolidated complaint was issued against SMG-Massena

[7] This is a factual admission, not a conclusion of law.

[8] I take administrative notice of the exceptions to the prior ALJD filed with the Board, as they are publicly available on the NLRB's website and are referred to in the present record. See Fed. R. Evid. 201.

[9] Although the companies, SMG-Massena and SMG Watertown, are referred to as different employers in the record, and there is no challenge to that designation, the record is unclear regarding what relationship actually exists between these two entities.

and SMG-Watertown on December 11, 2018, and a trial was held on the consolidated complaint in August 2019. On January 24, 2020, the prior ALJD issued on that consolidated complaint.

The prior ALJD found that SMG-Massena and SMG-Watertown engaged in a series of unfair labor practices and ordered make whole and other restorative remedies. Specifically, the ALJD found that SMG Massena unlawfully discharged employee David Romigh, who was also the union steward at SMG-Massena and the only employee participating on the bargaining team from SMG-Massena, in violation of Section 8(a)(3) and (1) and ordered SMG-Massena to reinstate Romigh, to pay backpay, and other make-whole remedies; refused to meet at reasonable times with the Union for the purpose of negotiating a successor CBA in violation of Section 8(a)(5) and (1), and ordered that, on request SMG-Massena bargain in good faith and at reasonable times with the Union regarding the employees in the Massena Unit until a full agreement or bona fide impasse is reached, and if an understanding is reached, to embody the understanding in a signed, written agreement; ordered that SMG-Massena cease and desist engaging in this or like or related conduct; and further ordered that SMG-Massena post a notice for 60 days drafted by the ALJ, which demonstrates to employees what SMG-Massena will refrain from doing and what it will affirmatively do to remedy the unfair labor practices.[10]

The Respondent asserts that the prior ALJD shows that SMG-Massena knew that the Respondent was not willing to negotiate a CBA while serious unfair labor practices remained in litigation, and therefore, remained unremedied, and that the ALJD demonstrates that SMG-Massena took the position at trial that the Union's refusal to bargain was done in bad faith. The ALJD states that in early 2019, the parties "bickered back and forth" over when they would meet. (Jt. Exh. E at 19-20; R. Brief at 11). The ALJD further stated:

> In July 2019, Gabalski [the union representative] informed King [the SMG representative] the Union would not meet to bargain unless the Company restored the laid off employees to their jobs and rescinded the unilateral changes it made following the impasse declaration. The Union never received counterproposals from King to its initial contract proposals for SMG-Massena, save for the proposed wage increases which would apply to both Watertown and Massena.
> (Jt. Exh. E at 20; R. Brief at 11)

Joint Exhibit C is the July 16, 2019 email from the Respondent to the Charging Party stating the Respondent's position that it would not bargain until the unilateral changes were remedied and the status quo restored.

[10] The prior ALJD also found that SMG-Watertown engaged in unfair labor practices, unlawful unilateral changes at a time when SMG and the Union were not at a valid impasse and direct dealing with employees in violation of Sec. 8(a)(5) and (1) and unlawful interrogation in violation of Sec. 8(a)(1).

III. ANALYSIS

A. The 8(b)(3) Allegation and Parties' Arguments

As summarized in the "Issue Presented" section above, the primary substantive legal question in this case is whether the Respondent's failure and refusal to resume negotiations for a successor CBA with the Charging Party following a written request from the Charging Party was a breach of the Respondent's duty to bargain, in violation Section 8(b)(3) of the Act. The General Counsel and the Charging Party argue that the Respondent's insistence that SMG-Massena and SMG-Watertown restore the status quo ante as ordered to do in the prior ALJD and order before the Respondent would resume collective bargaining with the Charging Party is an unlawful insistence on a permissive subject of bargaining. The Respondent's statement explicitly refers to remedying "unilateral changes," and the only unilateral changes found to violate the Act in the prior ALJD were those committed by the Charging Party at the SMG-Watertown facility affecting only the Watertown bargaining unit.

Although SMG-Massena and SMG-Watertown are now both owned by Stephens Media Group, traditionally, the bargaining units of on-air talent have been separate units with separate collective-bargaining agreements. The separate nature of these two bargaining units was a core issue in the prior case. The General Counsel asserts on brief that "[t]his case is a somewhat ironic outgrowth" of the prior case, because, in that case, the General Counsel alleged that the Charging Party violated the Act by failing to bargain with the Union regarding the Massena Unit's CBA instead, insisting that the separate CBAs for the traditionally separate bargaining units be bargained together, despite the Union's choice not to do so, thus, unlawfully insisting upon and then declaring impasse related to a permissive subject of bargaining. The irony referred to, it seems, is that in the prior case SMG took the position that the negotiations must include both units, while, here, the General Counsel argues that the Union insistence that the unlawful acts of SMG against both units must be remedied before the Union will return to CBA negotiations.

The Respondent Union argues in its defense that the Charging Party's offer to bargain in its January 31 letter could not have been made in good faith, as SMG had not remedied the prior violations, and it had filed exceptions to the prior ALJD with the Board regarding the bargaining violations, including the findings and conclusions related to the complaint allegations that SMG-Massena unlawfully failed to bargain in good faith in violation of 8(a)(5). The Respondent argues that the Board's well settled principle that a party's commission of serious unfair labor practices may suspend the other party's duty to bargain in good faith applies here, as the Respondent has not remedied the unfair labor practices by SMG-Massena affecting the Massena Unit. The Respondent Union asserts that by this complaint, the General Counsel seeks to deprive the Union of the remedies ordered in the prior ALJD, by obliging it to return to bargaining before the status quo is restored, while the case is pending before the Board on exceptions filed by SMG.

As discussed below, the Respondent raises two threshold affirmative defenses: 1) the complaint is time-barred pursuant to Section 10(b); and 2) the complaint should be dismissed because the General Counsel is precluded from relitigating the same facts fully considered in

the prior case pursuant to a different legal theory. See *Jefferson Chemical Co*., 200 NLRB 992 (1972) as interpreted in *Affinity Medical Center*, below.

B. Section 10(b) Threshold Analysis

Section 10(b) of the Act[11] states in relevant part that "…no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom the charge is made...." It extinguishes liability for unfair labor practices committed more than 6 months before the filing of the charge. *NLRB v. Fant Milling Co.,* U.S. 301, 309 n. 9 (1959) and *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 419 (1960). Thus, a charge must be both filed and served within 6 months of the alleged unfair labor practice. *Dun & Bradstreet Software Services*, 317 NLRB 84, 84–85 (1995). The 10(b) period commences when a party has "clear and unequivocal notice of a violation." *Leach Corp.,* 312 NLRB 990, 991–992 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995); *Ohio & Vicinity Regional Council of Carpenters (Schaefer Group),* 312 NLRB 366, 368 (2005), citing *St. Barnabas Medical Center*, 343 NLRB 1125, 1127-1129 (2004) (the Sec. 10(b) clock begins to run when the charging party has knowledge of the facts needed to support a ripe unfair labor practice allegation).[12] Moreover, sufficient notice may be found if the charging party should have become aware of a violation in the exercise of reasonable diligence. See, e.g., *Castle Hill Health Care Center*, 355 NLRB 1156, 1191 (2010); and *Moeller Bros. Body Shop*, 306 NLRB 191, 192 (1992).

Even on the limited record before me, it is clear that the Respondent Union advised SMG-Massena (and SMG-Watertown) as early as July 16, 2019 that it would not resume bargaining with SMG until the unilateral changes alleged in the complaint in the prior case had been remedied, to include the rescission of the changes and the reinstatement of laid off workers with backpay.[13] The Union's position was clear and unequivocal, in a written letter by union representative Gabalski send by email to SMG-Massena's attorney King on July 19, 2019 in direct response to King's written request to resume bargaining on July 10 (Jt. Exh. B and C; Jt. Fact j and k.) Specifically, Gabalski's letter states that the Respondent had "…advised SMG's counsel that it would resume bargaining once the bargaining unit members laid off in 2018 were reinstated with back pay, and the unilateral changes were rescinded. This remains our position." Id. The charge in the present case was filed and served on February 11, 2020, more than 6 months after July 16, 2019, and, therefore, more than 6 months after the Charging Party was on clear notice that the Union insisted on rescission of the unilateral changes before it would resume bargaining. *Allied Production Workers Union, Local 12,* 331 NLRB 1, 3-4 (2000).

[11] 29 U.S.C. § 160(b)

[12] A 10(b) defense is an affirmative defense, rather than a jurisdictional issue. The burden of proof is on the party raising the defense. *Leach Corp*., above.

[13] Indeed, Gabalski's July 16, 2019 letter implies that the Charging Party was aware of the Respondent's insistence that SMG rescind the unilateral changes and restore the status quo at SMG-Watertown before it would resume bargaining regarding either bargaining unit even before July 16, 2019.

King offered "once again" to resume bargaining on October 21, 2019, and then again on January 31, 2020, as "a follow up to" SMG's October 21 letter. (Jt. Exhs D and F; Jt Facts m and o). In response, Gabalski emailed a letter to King, that reiterates the Union's now long-held position, that it would like to return to bargaining regarding the Massena and the Watertown CBAs, but that it wants SMG to "first rescind all of the unilateral changes made in 2018, prior to the next round of bargaining." (Jt. Exh. F and G; Jt. Facts o and p.) The Respondent's attorney, Judiann Cartier emailed SMG-Massena's legal representative requesting the restoration of the status quo which existed prior to the unilateral changes in Watertown and continue them in effect until the parties reach a new collective-bargaining agreement. She stated that "[T]his includes the reinstatement of [six individuals], and the make whole remedies ordered" in the January 24 ALJD. She advised that, "[a]s soon as the status quo has been restored, the parties can resume negotiations for a successor collective-bargaining agreement."

The complaint in the present case alleges that the Respondent's February 4 email is the point at which the Respondent's refusal to bargain violation began. The present charge was filed and served on February 11, and so, the General Counsel argues, the 10(b) defense must fail. (GC Br. at 8-9.) I disagree. As discussed above, the February 4 statement by Gabalski on behalf of the Respondent merely restates the same position that the Respondent clearly articulated in writing on July 16, 2019. (Compare Jt. Exh. C and G.) The General Counsel also argues that the Respondent engaged in vague or conflicting actions that would nullify the notice provided outside the 10(b) period.

The Board will find that an unfair labor practice is not time-barred if the reason for the delay in filing the charge is a consequence of conflicting signals or otherwise ambiguous conduct by the other party. *Chapin Hill at Red Bank*, 359 NLRB 1119, 1123 (2013). In such a case, a charging party is found to have good reason to have been confused about the nature or intent of the charged party's actions. Id. The facts here simply do not support this argument. On the contrary, there is no record evidence to contradict my finding that the Respondent's refusal to bargain until the unilateral changes were rescinded and the status quo restored was remarkably consistent from at or before July 16, 2019 to February 4, 2020, and beyond. Nor, as the General Counsel infers, has the Respondent taken contrary positions regarding its desire to bargain two separate CBAs in the two separate units by insisting that the unfair labor practices found based on the consolidated complaint in the prior case be remedied before it returns to the table. The record reveals no point when the Respondent has taken any other position. See *The Arrow Line, Inc./Coach U.S.A.*, 340 NLRB 1, fn 1 (2003).

The Charging Party argues on brief that the Respondent's February 4 statement alleged unlawful in the complaint is not time barred, because it is part of a "continuing violation." (CP Br. at 10-11.) First, the Charging Party by this argument alleges that the Respondent Union has refused to bargain since December 2018. Not only is this argument inconsistent with the complaint allegations, but it is inconsistent with the prior ALJD, in which SMG, not the Union, was found to have failed and refused to bargain in good faith at all with the Union regarding the SMG-Massena bargaining unit. The Charging Party may not relitigate the issues found by the judge in the prior case, and in attempting to do so, it reaches for facts not in evidence on this record. Second, although the Board will find continuing violations in some circumstances, such as in the maintenance of unlawful handbook rules even if the rule was promulgated outside the

10(b) period[14], or the maintenance of unlawful contract provision although the contract was entered into outside the 10(b) period,[15] here, the Charging Party attempts to resuscitate the time-barred allegation by creating a situation where the Respondent merely reiterates its long-known position, without any new or changed circumstances. See *Ohio & Vicinity Regional Council of Carpenters (Schaefer Group)* above. Finally, although referring to a "continuing" violation theory, the Charging Party, like the General Counsel, argues that the Respondent's February 4 letter was an independent violation. I have found that that argument lacks merit on the facts of this case in the discussion above.

Therefore, I conclude that the charge in Case 03-CB-256179 is time barred, and the complaint should be dismissed.

C. Jefferson Chemical Threshold Analysis

The Respondent also argues that the complaint should be dismissed because the 8(b)(3) allegation is based on facts available to the General Counsel in the prior case. Specifically, the July 19, 2019 letter from Gabalski stating the Union's position was an exhibit in the prior case, and the substance of it was referred to in the fact section of the prior ALJD (Jt. Exhs E and G), but the General Counsel failed to pursue that allegation in the prior hearing in August 2019 despite having notice of all the material facts to have done so. The Board has held that the General Counsel may not relitigate the lawfulness of conduct in separate proceedings by asserting that the conduct violates different sections of the Act. *Jefferson Chemical Co*., 200 NLRB 992 (1972). The Board has held that *Jefferson Chemical* only applies to cases involving relitigating the same facts or conduct (e.g., litigating the same facts or conduct under a different legal theory or Section of the Act). *Affinity Medical Center,* below. Where the allegations are independent, the Board considers that the separate proceedings should not sacrifice fairness and efficiency. *DHSC LLC, d/b/a Affinity Medical Center*, et al., 364 NLRB No. 68 slip op. at 2 (2016); compare discussion in *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 369 NLRB No. 56, slip op. at 10 (2020).

Here, the Union's position that it would only return to bargaining after the unilateral changes had been rescinded and the status quo restored was a part of the case litigated before the administrative law judge in the prior case. The Union's position had not changed since the prior case, and the complaint in the present case attempts to resurrect a set of facts that were present during the litigation of the prior case. Although, on this record, no charge was filed against the Union for this stated refusal to bargain until the unilateral changes were restored to the status quo, the Respondent has sufficiently established that the facts were considered in the prior case, albeit as a purported defense to SMG's alleged failure bargain in good faith. If the Respondent's insistence that the Charging Party must remedy its serious unfair labor practices

[14] See e.g., *Dynamic Nursing Services, Inc*., 369 NLRB No. 49, slip op. at 3 (2020); *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 1 n. 4 (2018), enfd. 939 F.3d 798 (6th Cir. 2019); and *Cellular Sales of Missouri*, LLC, 362 NLRB 241, 242 (2015), affd. in relevant part 824 F.3d 772, 779 (8th Cir.2016).

[15] *Central Pennsylvania Regional Council of Carpenters*, 337 NLRB 1030 (2002), enfd. 352 F.3d 831 (3d Cir. 2003) (anti-dual shop clause); and *Teamsters Local 293 (R. L. Lipton Distributing)*, 311 NLRB 538, 539 (1993) (shop steward superseniority clause).

in the SMG-Watertown unit before it would bargain with the Charging Party in the SMG-Massena Unit was an unfair labor practice, then the General Counsel knew, or should have been on notice, of the violation during the August 2019 litigation. Thus, although the Board applies *Jefferson Chemical* narrowly, here, the facts alleged as unlawful are not independent of those litigated in the prior case. See *Affinity Medical Center,* above.

Moreover, failing to hear the present complaint is not inconsistent with fairness and administrative economy, as it only arises in the context of the Charging Party's failure to remedy the violations found in the prior case while it awaits review of the ALJD by the Board. It is well established that a party acts at its own risk by failing to comply with a recommended order issued with an ALJD, pending Board review; it is the Charging Party in this case that has chosen to take the risk that its liability may be greater if the Board affirms the findings and conclusion in the pending ALJD. The Charging Party's attempt to resurrect a stale unfair labor practice allegation by reiterating a request to bargain while still not remedying its unfair labor practice violations or asserting any changed conditions does not alter the reality that the same facts are being considered in this present complaint as the prior consolidated complaint, under a different legal theory. Whether the Charging Party's January 31 request to bargain has any effect on tolling its bargaining obligation can be determined in the compliance proceedings, if the Board affirms the prior ALJD. This intermittent proceeding that requires the administrative law judge and, likely the Board, to reconsider facts relevant to the prior case, and address facts relevant to a potential compliance case, is arguably partly duplicative of considerations in the prior case and partly premature to a compliance case.

Therefore, I would dismiss the complaint pursuant to *Jefferson Chemical*, above, as interpreted by the Board in *Affinity Medical Center*, above

D. Considerations on the Merits

I have found above that the complaint should be dismissed pursuant to the statute of limitations in Section 10(b) of the Act and, in the alternative, it should be dismissed pursuant to the Board's policy precluding the General Counsel from relitigating the same facts already considered in a prior case under a different legal theory. The merits, therefore, are no longer before me. However, I consider the merits below in order to avoid unnecessary remand of the case for a determination on the merits if the Board were to disagree with my recommendation to dismiss the complaint pursuant to Section 10(b) and/or *Jefferson Chemical*, above.

In this somewhat unusual context, the General Counsel asks me to find that the Respondent has acted in bad faith, while unfair labor practice violations found against the Charging Party in the prior ALJD remain unremedied, including the Charging Party's failure to bargain over more than two years in violation of Section 8(a)(5) and (1) and the Charging Party's discriminatory termination of a union steward/bargaining team member in violation of Section 8(a)(3) and (1). Neither the General Counsel nor the Charging Party has cited any legal precedent to support their proposition that, here, the Respondent is not entitled to the remedy ordered by the administrative law judge in the prior case, and therefore, not entitled to a restoration of the status quo, including the reinstatement and make whole remedies and bargaining remedies ordered in the Massena Unit, before the Charging Party's unfair labor

practices are considered cured and the tolling of the Union's obligation to bargain in the absence of a restored "playing field" is lifted. The government's brief does not even address the fact that the Respondent's failure or refusal to resume bargaining with the Charging Party upon the Charging Party's request occurred in a context where the Charging Party has failed to remedy serious unfair labor practice violations found against SMG-Massena. Indeed, the General Counsel goes so far as to state in his brief, that "…there was no status quo to restore." GC Br. at 7. I find this statement not only erroneous, but truly puzzling. Neither the General Counsel nor the Charging Party address (legally or factually) how the Respondent could be expected to trust that the Charging Party will bargain in good faith with the Union, absent remedying the outstanding violations found.

The General Counsel argues that the Charging Party's offer to bargain on January 31 was an attempt to remedy the 8(a)(5) violation found in the prior ALJD, "by reaching out to Respondent days after the ALJ decision issued…" This perspective is legally erroneous. If the Charging Party wished to remedy the 8(a)(5) allegations, it could comply with the order in the prior ALJD. The order in the prior ALJD does not require it to offer to bargain; it requires it to bargain with the Union, upon request, among other remedies. In the absence of agreement (such as a settlement agreement) from the Respondent, this lone act does not remedy the Charging Party's unfair labor practice violations. Again, by choosing not to comply with the order in the ALJD, the Charging Party assumed the risk that it would have to comply to a Board issued order in the future. That is its right under the Board's procedures. Neither the General Counsel nor the Charging Party can simply pronounce that something less than the remedies ordered in the prior ALJD must be accepted by the Respondent as restoring the status quo. Neither the General Counsel nor the Charging Party point to any legal precedent that suggests otherwise.

The Board has determined that a party's refusal to bargain while the opposing party's serious unfair labor practices remain unremedied and the status quo not restored is not an unfair labor practice, because the opposing party's refusal to bargain in good faith may remove the possibility of good faith negotiations, and thus preclude the opportunity for the party's good faith to be tested. *Chicago Tribune Co*., 304 NLRB 259, 260 (1991); see also *County Concrete Corp*., 366 NLRB No. 64 (2018) and *AAA Motor Lines, Inc.*, 215 NLRB 793 (1974). The record is clear that the prior ALJD and order required SMG-Massena to bargain in good faith, to reinstate with backpay union steward Romigh, to post a notice to employees for 60 days, and cease and desist engaging in these or related unfair labor practices. The Board has long held that a notice posting is an important, substantive element of a Board remedy.[16] The posting of a Board notice to employees for 60 days in all areas where employee notices are posted is a standard, traditional remedy that not only provides employees with information about the resolution of the case, their rights under the Act, and what behavior they can expect their employer to abide by, but also demonstrates the ability of the government to address violations of the Act. The notice posting requirement attempts to remedy any chilling effects of the employer's wrongdoing on the employees and their bargaining relationships.

[16] See generally the Board's discussion of the purposes of notice posting remedies in *HTH Corp.,* 361 NLRB 709, 713-718 (2014), affirmed in relevant part, *HTH Corp. v. NLRB*, 823 F.3d 668 (DC Cir. 2016).
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Even if I were to find, which I have not, that the Charging Party's offer to bargain on January 31 was sufficient to toll its bargaining obligation, its failure to remedy its serious unfair labor practices leave the relationship with the Respondent Union in an unbalanced status compared to the status before the unfair labor practices occurred and the Respondent is entitled to have the power balance between the parties restored before it is required to resume bargaining. Thus, the Respondent's obligation to bargain in good faith was suspended, and the 8(b)(3) allegation is not supported. See *County Concrete*, above, slip op. at fn 1.

Therefore, I find that the Respondent was entitled to refuse to bargain under the circumstances because its obligation to return to the bargaining table was suspended until the Charging Party remedied its own serious unfair labor practice violations. The Respondent, therefore, did not violate 8(b)(3) as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Charging Party, Stephens Media Group-Massena, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, National Association of Broadcast Employees and Technicians-Communication Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. This dispute affects commerce and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

4. The complaint allegations seek to remedy conduct outside the 6-month statute of limitations of Section 10(b) of the Act and are therefore time-barred.

5. The complaint seeks to resurrect and relitigate facts that were known to the General Counsel and that were presented and considered in a prior case heard by another administrative law judge under a different legal theory than the prior case.

6. The Respondent did not violate Section 8(b)(3) by failing or refusing to return to bargaining based on the Charging Party's January 31, 2020 request, because it was not obligated to do so while the Charging Party's serious unfair labor practices found in Cases 03-CA-226225, 03-CA-227924, 03-CA-227946 remained unremedied and the status quo ante not restored by the Charging Party.

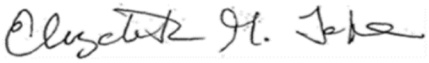
On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [17]

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C., March 31, 2021.



Elizabeth M. Tafe
Administrative Law Judge